

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2006 APR 12 PM 1:39

IN THE MATTER OF:

Mr. Ernie Fischer
Selfridge, North Dakota

Respondent.

Proceeding under Sections 113(a)(3) and (d) of the
Clean Air Act, 42 U.S.C. §§ 7413(a)(3) and (d)

Docket No.: CAA-08-2006-0002

EPA REGION VIII
HEARING CLERK

**FIRST AMENDED
COMPLAINT FOR PENALTY
COMPLIANCE ORDER, AND
NOTICE OF OPPORTUNITY
FOR HEARING**

INTRODUCTION

1. This civil administrative enforcement action is authorized by Congress in sections 113(a)(3) and (d) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7413(a)(3) and (d). The federal regulations regarding the asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) are set out in part 61, subpart M, of title 40 of the Code of Federal Regulations (40 CFR). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Rules of Practice"), 40 CFR part 22, a copy of which is enclosed.
2. The undersigned Environmental Protection Agency, Region 8 ("EPA"), officials have been properly delegated the authority to issue this Complaint for Penalty, Compliance Order and Notice of Opportunity for Hearing ("Complaint").
3. EPA proposes the assessment of a civil penalty and compliance measures based on Respondent Ernie Fischer's ("Respondent") alleged violation of the CAA and the NESHAP regulations, as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge ("ALJ") to disagree with any factual allegation made by EPA in the Complaint, or the appropriateness of the proposed penalty, or to present the grounds for any legal defense it may have.
5. To disagree with the Complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Region 8 Hearing Clerk at the following address:

Region 8 Hearing Clerk
U.S. EPA Region 8 (8RC)
999 18th Street, Suite 300
Denver, CO 80202

within 30 calendar days of receiving this Complaint and provide a copy to the enforcement attorney listed below. The answer must clearly admit, deny or explain the factual allegations of the Complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT, OR UP TO THE MAXIMUM AUTHORIZED BY THE CAA.**

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty and performing the compliance tasks set forth in the Complaint. Such action to comply and make payment need not contain any response to, or admission of, the allegations in the Complaint. Such action to comply and make payment constitutes a waiver of Respondent's right to contest the allegations and appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process.

SETTLEMENT NEGOTIATIONS

7. EPA encourages settlement discussions through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Brenda Morris, Enforcement Attorney, at [1-800-227-8917; extension 6891 or 303-312-6891] or at the address identified in paragraph 52 herein. **Please note that contacting the attorney or requesting a settlement conference does NOT delay the running of the 30-day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

The following general allegations apply to all times relevant to this action, and to each count of this Complaint:

8. The asbestos NESHAP regulations apply to, among other things, the demolition and renovation of buildings.
9. The Standing Rock Sioux Indian Tribe ("Tribe") owns the former Selfridge Cheese Plant facility ("facility") located in Selfridge, North Dakota.
10. The building is a "facility" within the meaning of 40 CFR § 61.141.

11. Respondent Ernie Fischer is an individual living in the State of North Dakota, within the exterior boundaries of the Standing Rock Sioux Indian Reservation.
12. Respondent is a "person" as defined by section 302(e) of the CAA, 42 U.S.C. § 7602(e).
13. Respondent is an "operator" within the meaning of 40 CFR § 61.141.
14. During the week of June 6, 2005, the Respondent demolished the facility, including the roof and exterior walls, using heavy machinery in the form of a bobcat.
15. Respondent "demolished" the facility within the meaning of 40 CFR § 61.141.
16. Badlands Environmental Consultants ("Badlands"), on behalf of the Tribe, took 15 samples of the debris from the facility demolition on July 22, 2005, and submitted the samples to Crisp Analytical Labs at Houston, LLC, and Schneider Laboratories, Inc., for asbestos and lead analyses, respectively.
17. 40 CFR § 61.141 defines "asbestos" to mean the asbestiform varieties of serpentine (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.
18. According to the analytical results for the debris from the building demolition, two types of building debris tested positive for asbestos. The sample of black roof material tested at 3 % chrysotile, and the light green and grey transite tested at 30 % chrysotile.
19. 40 CFR § 61.141 defines "friable asbestos material" as any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, . . . that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.
20. 40 CFR § 61.141 defines "nonfriable asbestos-containing material" as any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, . . . that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.
21. 40 CFR § 61.141 defines "category I nonfriable asbestos-containing material (ACM)" to mean asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy.
22. 40 CFR § 61.141 defines "category II nonfriable ACM" to mean any material, excluding category I nonfriable ACM, containing more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized

Light Microscopy that when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

23. 40 CFR § 61.141 defines "regulated asbestos-containing material" ("RACM") as a) friable asbestos material, b) category 1 nonfriable asbestos-containing material that has become friable, c) category I nonfriable asbestos-containing material that will or has been subject to sanding, grinding, cutting or abrading, or d) category II nonfriable asbestos-containing material that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.
24. 40 CFR § 61.141 defines "asbestos-containing waste materials" to mean mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart including filters from control devices, friable asbestos waste material and bags or similar packaging contaminated with commercial asbestos. As applies to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.
25. EPA document #340/1-92-013, entitled "A Guide to Normal Demolition Practices Under the Asbestos NESHAP", dated September 1992, states on page 1-1 that "nonfriable asbestos-cement products such as transite are an example of Category II material."
26. "A Guide to Normal Demolition Practices Under the Asbestos NESHAP" states on page 4-1 that "use of heavy machinery during the razing process causes Category II nonfriable ACM, but not Category I nonfriable ACM to become RACM."
27. Badlands, at the Tribe's request, completed an asbestos assessment at the facility, including quantification of transite cement board previously identified as asbestos-containing, wherein it concluded that approximately 1000 square feet of asbestos transite cement board debris was scattered throughout the facility. Badlands noted that some transite remained attached to building components.
28. Section 114 of the CAA, 42 U.S.C. § 7414, authorizes the Administrator to require any person who is subject to any requirement to provide such information as the Administrator may reasonably require for the purpose of determining whether a person is in violation of any requirement.
29. Pursuant to section 113(d) of the CAA, 42 U.S.C. § 7413(d), the Administrator may, in part, issue a administrative order against any person assessing a civil administrative penalty of up to \$32,500 per day of violation, when on the basis of available information, the Administrator finds such person in violation of any requirement or prohibition of this

subchapter or subchapter III, IV-A, V, or VI of this chapter, including a requirement or prohibition of any rule promulgated under this chapter.

30. Section 113(a)(3)(B) of the CAA, 42 U.S.C. § 7413(a)(3)(B), provides, in part, that the Administrator may issue an order requiring a person to comply with a requirement or prohibition upon finding that such person has violated, or is in violation of, any requirement or prohibition of this subchapter, section 7603, or subchapter IV-A, V, or VI of this chapter, including a requirement or prohibition of any rule promulgated under those provisions or subchapters.

COUNT 1

Failure to notify EPA of intent to demolish

31. 40 CFR § 61.145(b)(1) requires each owner or operator of a demolition or renovation activity to, among other things, provide EPA with written notice of intent to demolish or renovate.
32. Respondent failed to provide EPA written notice of intent to demolish the facility.
33. Respondent's failure to provide EPA written notice of intent to demolish the facility is a violation of 40 CFR § 61.145(b)(1) and CAA § 113, 42 U.S.C. § 7413.

COUNT 2

Failure to remove RACM

34. 40 C.F.R. § 61.145(c)(1) requires the owner or operator of a demolition or renovation activity, among other things, to remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.
35. Following the Respondent's demolition activities, asbestos-containing waste material was scattered throughout the demolition debris, and some RACM was still attached to building components
36. Respondent failed to remove all RACM from the facility before demolishing the building with heavy machinery.
37. Respondent's failure to remove all RACM from the facility before beginning any activity that would break up, dislodge, or similarly disturb the material constitutes a violation of 40 CFR § 61.145(c)(1) and CAA § 113, 42 U.S.C. § 7413.

COUNT 3

Failure to not discharge visible emissions to the outside air

38. 40 CFR § 61.150(a), requires that the owner or operator of a demolition or renovation activity discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or transporting of any asbestos-containing waste material generated by the source.
39. Respondent transported approximately four truck loads of demolition debris from the facility to a private road located off-site.
40. Respondent discharged visible emissions to the outside air by allowing asbestos-containing waste material in the demolition debris to be exposed to the outside air.
41. Respondent's failure to not discharge any visible emissions to the outside air during the collection, processing (including incineration), packaging or transporting of any asbestos-containing waste material generated by the source constitutes a violation of 40 C.F.R. § 61.150(a), CAA § 113, 42 U.S.C. § 7413.

COUNT 4

Failure to properly dispose of asbestos-containing waste

42. 40 CFR § 61.150 (b)(1) requires the owner or operator of a demolition or renovation activity, among other things, to deposit all asbestos-containing waste materials as soon as is practical at a waste disposal site operated in accordance with the asbestos NESHAP.
43. Respondent discarded approximately four truck loads of demolition debris from the facility on a private road to assist with erosion control at the point where the road intersects Porcupine Creek. Respondent left the remaining demolition debris, including asbestos-containing waste material, on site.
44. Respondent's failure to deposit all asbestos-containing waste materials as soon as practical at a waste disposal site operated in accordance with the asbestos NESHAP constitutes a violation of 40 C.F.R. § 61.150(b)(1).

COUNT 5

Failure to respond to information request

45. EPA issued Respondent a Request for Information pertaining to the facility demolition pursuant to section 114 of the CAA, 42 U.S.C. § 7414, on September 29, 2005.

46. The Request for Information required that Respondent respond within thirty (30) days of receipt, accompanied by a notarized certificate signed by the person preparing the response
47. According to the return receipt signed by Respondent, Respondent received the Request for Information on October 19, 2005.
48. Respondent's response to the Information Request was due to EPA on or before November 18, 2005.
49. Respondent failed to respond to the Request for Information or otherwise contact EPA by November 18, 2005.
50. Respondent's failure to respond to EPA's Request for Information constitutes a violation of CAA § 114, 42 U.S.C. § 7414.

PROPOSED CIVIL PENALTY

51. The proposed civil penalty has been determined in accordance with section 113(d) of the CAA, 42 U.S.C. § 7413(d). Section 113(d)(1) of the CAA, 42 U.S.C. 7413(d)(1), and 40 C.F.R. part 19 authorize EPA to assess a civil penalty of up to \$32,500 per day for each violation of the asbestos NESHAP regulations occurring after March 15, 2004. In determining the amount of any civil penalty assessed, EPA is required to take into account, in addition to such other factors as justice may require, the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. 42 U.S.C. § 7413(e). Based upon an evaluation of the facts alleged in this Complaint and the statutory factors set forth in CAA § 113(e), 42 U.S.C. § 7413(e), EPA proposes a civil penalty of **\$76,400** based on the violations alleged above.
52. Complainant evaluated facts and circumstances of this case with specific reference to U.S. EPA's Clean Air Act Stationary Source Penalty Policy dated October 25, 1991 (penalty policy) and Appendix III of the penalty policy, Asbestos Demolition and Renovation Civil Penalty Policy, revised May 5, 1992. Enclosed with this Complaint is a copy of Appendix III of the penalty policy.

COMPLIANCE ORDER

53. Respondent must comply with 40 CFR § 61.150(a) which requires that the owner or operator of a demolition or renovation activity discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or

In the Matter of Ernie Fischer

Complaint for Penalty and Compliance Order - 7

transporting of any asbestos-containing waste material generated by the source, and 40 CFR § 61.150 (b)(1) which requires the owner or operator of a demolition or renovation activity, among other things, to deposit all asbestos-containing waste materials as soon as is practical at a waste disposal site operated in accordance with the asbestos NESHAP. In order to comply with above requirements, Respondent must ensure that a certified asbestos contractor: 1) removes all asbestos-containing waste material in the building debris, 2) carefully bags all asbestos-containing waste material from the building debris, 3) properly transports (using a marked vehicle) all asbestos-containing waste material to an approved asbestos landfill, and 4) maintains asbestos waste shipment records documenting the transport of the asbestos-containing waste material to the landfill.

54. Respondent must provide evidence of compliance with the above requirements to the following EPA representative by May 30, 2006:

Brenda South (8ENF-AT)
U.S. EPA - Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466
Telephone: (303) 312-7076
Facsimile: (303) 312-6191
Email: south.brenda@epa.gov

55. Respondent's payment of the penalty shall be made by money order or certified check made payable to "Treasurer, United States of America" and mailed to the following address:

EPA - Region 8
Regional Hearing Clerk
P.O. Box 360859
Pittsburgh, Pennsylvania 15251

A copy of said check shall be mailed to the following address:

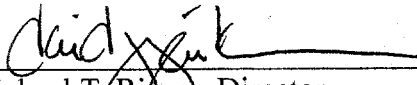
Brenda Morris (8ENF-L)
Enforcement Attorney
U.S. EPA - Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

56. The provisions of this Complaint shall apply to and be binding upon Respondent, its officers, directors, agents, servants, employees, and successors or assigns.

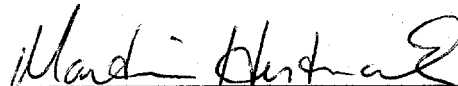
57. Pursuant to section 113(a)(4) of the CAA, 42 U.S.C. § 7413(a)(4), no order issued under CAA section 113 shall take effect until the person to whom it is issued has had an opportunity to confer with EPA concerning the alleged violation(s).
58. Section 113(d) of the CAA, 42 U.S.C. § 7413(d) provides that an administrative penalty assessed under the subsection shall be assessed by the Administrator by an order made after opportunity for a hearing and following written notice by the Administrator to the person to be assessed an administrative penalty of the proposal to issue such order and an opportunity to request a hearing on the order within thirty (30) days of receipt of notice.
59. This Complaint does not constitute a waiver, suspension, or modification of the requirements of any applicable provision of the CAA or the asbestos NESHAP regulations which remain in full force and effect. Issuance of this Complaint is not an election by the EPA to forego any civil or any criminal action otherwise authorized under the CAA.

Issued this 12th day of April, 2006

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION 8
Complainant



Michael T. Risner, Director
David J. Janik, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice



Martin C. Hestmark, Director
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April ¹¹~~12~~, 2006, the original and one copy of the FIRST AMENDED COMPLAINT FOR PENALTY, COMPLIANCE ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING, was hand-carried to the Regional Hearing Clerk, EPA, Region 8, 999 18th Street, Denver, Colorado, and that a true copy of the same was mailed by certified mail to:

Ernie Fischer
P.O. Box 173
Selfridge, ND 58568

Date 4/12/06

Judith M. McTernan
Signature